Bail Slip

The Accused viz., Flex @ Felix John S/o. Thanislas was directed to be released on bail as per the order of this Court dated 9.12.2004 and made in Crl.M.P.No.11438 of 2004 in Crl.A.No.449 of 2004 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.08.2006

CORAM

THE HONOURABLE MR. JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE S.MANIKUMAR

CRL. APPEAL NO. 449 OF 2004

1) Balu @ Dhanapal
2) Felx @ Felix John .. Appellants/ Accused 1 and 2

- Vs -

State by
Deputy Superintendent of Police
Bhavani. .. Respondent / Complainant

Criminal Appeal filed u/s. 374 (2) Cr.P.C. against the conviction and sentence passed by the learned Principal Sessions Judge, Erode, in S.C. No.142 of 2003 dated 3.3.04 as stated therein.

For Appellants : Mr. V.K.Muthusamy, SC, for
Mr. M.M.Sundaresh

For Respondent : Mr. N.R.Elango, APP

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY R.BALASUBRAMANIAN, J.)

Appellants, two in number, were tried in S.C. No.142/03 on the file of the Principal Court of Sessions, Erode, under Section 448 IPC (A-1 & A-2); Section 307 IPC read with Section 3 (2) (v) of the Scheduled Casts & Scheduled Tribe (Prevention of Atrocities) Act (A-1); Section 307 read with 34 IPC read with Section 3 (2) (v) of the Scheduled Casts & Scheduled Tribe (Prevention of Atrocities) Act (A-2); Section 302 IPC read with Section 3 (2) (v) of the Scheduled Casts & Scheduled Tribe (Prevention of Atrocities) Act (A-1); Section 302 read with 34 IPC read with Section 3 (2) (v) of the Scheduled Casts & Scheduled Tribe (Prevention of Atrocities) Act (A-2) and Section 506 (II) IPC (A-1). At the end of the trial, the learned trial Judge found the accused guilty of all the offences referred to above and convicted them for the gravest

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offence to undergo imprisonment for life together with a fine carrying a default sentence. We are not referring to the other sentences given to the convicted accused since it is lesser than the sentence given for the gravest offence. Hence, the appellants are before this Court in this appeal. Heard Mr.V.K.Muthusamy, learned senior counsel appearing for the appellants and Mr.N.R.Elango, learned Addl. Public Prosecutor appearing for the State.

2. The prosecution case is that on the intervening night of 10.3.03 and 11.3.03 around 1.00 a.m., the accused trespassed into the house of P.W.1 and her husband and besides making an attempt on the life of P.W.1, committed the murder of P.W.1's husband and in the course of the same transaction, criminally intimidated the witnesses, who came running to prevent any further onslaught and, therefore, punishable for the offence referred to earlier. The prosecution examined P.W.s 1 to 20 besides marking Exs.P-1 to P-32 and M.O.s 1 to 19. The defence did not let in any oral or documentary evidence.

3. P.W.1 is an injured eye witness and she is the wife of the deceased. She belongs to a downtrodden community. A-1 belongs to Hindu - Gounder community and A-2 belongs to Nadar community. A-1's father has garden-lands. That garden-land is adjoining the garden-land of P.W.1. Over a cart-track, there was a dispute between the two families since the last five years. Two years prior to the occurrence day, the deceased and P.W.2 were filling up sand in the cart-track. On seeing that, A-1's father and A-1's elder brother assaulted P.W.1's husband and P.W.2 leading to a complaint in the police station at their instance. One year prior to the occurrence, in the same cart-track, A-1's father and A-1's elder brother, with a view to prevent the prosecution party from using the cart-track, stacked stones in the said cart-track. P.W.2, his wife and another relative of P.W.1 questioned the accused party as to why they are obstructing the cart-track. On that occasion also, A-1's father and A-1's elder brother assaulted P.W.2 and others calling them by their community name. On that occurrence also a prosecution under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act had been lodged. Therefore, both the families are at loggerheads. At about 4.00 p.m. on 10.3.03, when P.W.1 and her husband (since deceased) were working in their garden-land, A-1 and A-2 came there. At that time A-1 demanded that P.W.1 and her husband should withdraw the case given against his father and his brother. They also threatened that if the case is not withdrawn, then something different would happen to him. Then they left. P.W.1 and her husband returned home at 7.00 p.m. and they told P.W.s 2 and 9 about the incident at 4.00 p.m. in the garden-land. P.W.s 2 and 9 advised them to keep quiet for that night and they could talk it over on the next day morning. Accordingly, after taking dinner, P.W.1 and her husband took to their bed. The electric lamp was burning. Around 1.00 a.m., she heard dogs barking. She woke up and at that time she saw both the accused standing by the side of the cot in which her husband was sleeping. A-1 was armed with a suri kathi and A-2 had a stick in his hand. On seeing P.W.1 waking up, A-1 addressing her by her caste name, questioned her as to why would she not withdraw

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the case as requested and then saying so, he stabbed her on her right axilla. At that time, A-2 aimed a blow on her with the stick. As by that time she fell down, she did not receive any injury on that attempt. On hearing the noise, her husband (deceased) woke up. A-1 calling him by his caste name, threatened him as to why he should not withdraw the case and so saying stabbed him on his left side chest with the knife he had. P.W.1 shouted that her husband is being killed. On hearing that noise, P.W.s 2, 3, 9 and others came running. All those persons have their residence close to the garden-land of P.W.1. All those persons also pleaded with the accused not to stab. On the witnesses saying so, A-1 criminally intimidated them by saying that if they dare to near him, they would also meet the same fate. At that time, A-2 by turning her husband to the ground on his face, held him tightly enabling A-1 to stab on her husband's back (shoulder); flank; hip and other places. Then the accused made good their escape. M.O.1 is the said suri kathi used by A-1 and M.O.2 is the stick in the hands of A-2. Then P.W.2 by making use of the phone from a nearby house, informed P.W.11, who reached the crime scene at 5.00 a.m. in his car. P.W.11 transported P.W.1 and her husband in his car in the company of P.W.s 2 and 9 to the Government Hospital, Andhiyur, which they reached at 6.15 a.m. Initial treatment was given to both of them at Andhiyur Government Hospital and going by the nature of the injury, the duty doctor advised them to be taken to the Government Headquarters Hospital at Erode. On they reaching the Government Headquarters Hospital at Erode, at 10.00 a.m., P.W.1 alone was admitted as an in-patient in the said hospital and her husband, on medical advise, was transferred to the Government Medical College and Hospital, Coimbatore. At 10.00 a.m. on that day, when P.W.1 was in the Government Hospital, Erode, the Sub-Inspector of Police from the investigating police station reached the hospital and examined her. She gave the details to him, which he reduced into writing. Then the Sub-Inspector of Police read over the complaint to her and after that she put her left thumb impression in it. Ex.P-1 is the said complaint. At 8.00 p.m. on that day, the Deputy Superintendent of Police examined her. At that time he recovered M.O.s 3 to 5 from her. She came to know that on the next day morning her husband died at the Coimbatore Medical College Hospital. Two months after the occurrence she was taken to the Central Prison, Coimbatore, where she identified A-2 in the test identification parade conducted by the Judicial Magistrate.

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4. P.W.6 is the duty doctor in the Government Hospital, Andhiyur. At 6.15 a.m. on 11.3.03, P.W.11 brought injured Murugan for injuries shown to have been sustained by him at 1.00 a.m. on that morning by the use of a suri kathi at the hands of two known persons. On Murugan, since deceased, the doctor found various symptoms as noted by him in Ex.P-7, the accident register. The symptoms noted by him are as hereunder :-

> "1) A widened laceration of muscle depth 10 x 10 cm on left side of chest near the nipple.
> 2) A linear abrasion of 11 x 1 cm of muscle depth on back of chest.
> 3) A laceration of 6 x 5 of muscle depth over the back of abdomen.

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4) A laceration of 6 x 1 of muscle depth on back of right scapula.
5) A stabbed wound of 5 x 3 x muscle depth on the back of waist.
6) A stabbed wound of 15 x 6 cm of muscle depth on right buttock.
7) A laceration of 3 x 1 x 1 cm over left elbow.
Patient referred to Erode G.H."

On the same day he also examined P.W.1 for injuries shown to have been sustained by her at 1.00 a.m. on that morning in her house at the hands of two known persons by the use of suri kathi. On her the doctor found various symptoms as noted by him in Ex.P-8, the wound certificate. The symptoms noted by him are as hereunder :-

"A laceration of 10 x 5 cm of muscle depth over right side of chest below the left scapula on the back.
Patient referred to Erode G.H. - D.O.D. 7.4.2003
X-ray right side chest PA view I.D. No.45386-11.3.2003
Fracture of 8th rib present. D.O. X-ray - 2196.
From the above X-ray report I am of the opinion that the injuries are grievous in nature."

Ex.P-28 is the intimation sent by him to the Sub-Inspector of Police, Andhiyur on the medico-legal case of Murugan, since deceased and P.W.1.

5. P.W.19 is the Sub-Inspector of Police in Andhiyur police station. On receipt of information from the Government Hospital, Andhiyur, regarding the medico-legal case, he reached the Government Hospital, Andhiyur at 7.20 a.m. where he came to know that all the injured have been transferred to the Government Hospital, Erode. Ex.P-28 is the intimation received from the hospital. From the Government Hospital, Andhiyur, he reached the Government Hospital, Erode at 9.30 a.m. On enquiry he came to know that Murugan, since deceased, has already been transferred to the Coimbatore Medical College Hospital. However, he found P.W.1 as an in-patient in the hospital and by examining her reduced her statement into writing. Ex.P-1 is the said complaint given by P.W.1 in which he got her thumb impression after reading it over to her. Then he came back to the police station at 12.00 noon and registered the said complaint in crime No.92/03 under Sections 452, 307, 342, 506 (II) IPC and Section 3 (2) (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act. Ex.P-29 is the printed first information report prepared by him. He sent the express records to court as well as to higher officials.

6. P.W.20 is the Deputy Superintendent of Police. At 12.45 p.m. on 11.3.03 he received the express records and commenced investigation. At 2.15 p.m. on the same day, he reached the crime scene where in the presence of P.W.12 and another, prepared the observation mahazar, Ex.P-14. Ex.P-30 is the rough sketch prepared by him. From the scene of occurrence, he recovered M.O.s 1 and 8 to 11 under Ex.P-15 attested by the same witnesses. He examined P.W.s 2, 3 and 9 by recording their statements. Then he reached the Government Hospital, Erode at 8.00 p.m. and by examining P.W.1 recorded her statement. Then, in the presence of P.W.12 and

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another he recovered M.O.3, bloodstained jacket, M.O.4, bloodstained saree and M.O.5, bloodstained inskirt under Ex.P-16. He came to know that at 2.05 p.m. on that day Murugan breathed his last in the Government Hospital, Coimbatore, which information he received at 5.30 p.m. on that day. Accordingly, he altered the section of offence to one under Section 302 IPC and prepared Ex.P-31, the altered express first information report. He sent the express records to the court as well as to the higher officials. From 8.00 a.m. till 11.00 a.m. on 12.3.03 he conducted inquest over the dead body in the mortuary in the Government Medical College Hospital, Coimbatore in the presence of panchayatadars and witnesses. Ex.P-32 is the inquest report. During inquest he examined P.W.s 2, 9 and others by recording their statements. He again examined P.W.1 in the Government Hospital, Erode and recorded her statement. He examined P.W.11 and others on 13.3.03 and recorded their statements.

7. P.W.13 is the photographer, who took photographs of the crime scene from three different angles. M.O. 12 series and M.O.13 series are the photographs and negatives. P.W.12 witnessed the preparation of the observation mahazar, Ex.P-14 and recovery of M.O.s 7 to 11 under Ex.P-15. He also witnessed the recovery of M.O.s 3 to 5 under Ex.P-16. P.W.20 gave a requisition to the jurisdiction Tahsildar to issue community certificates for the accused, the deceased and P.W.1. P.W.8 is the Tahsildar, who had issued Exs.P-10 and P-11, the community certificates to P.W.1 and the deceased. He also issued community certificates, Exs.P-12 and P-13 for A-1 and A-2. P.W.20 arrested A-1 at 11.00 a.m. on 20.3.03 in the presence of P.W.15 and another. On examination, A-1 gave a voluntary confession statement, the admissible portion of which is Ex.P-17. Pursuant to Ex.P-17, M.O.s 1 and 14 to 16 came to be recovered under Ex.P-18. P.W.15 is the Village Administrative Officer, who had deposed about the arrest of A-1; his examination; recording his confession statement, the admissible portion of which is Ex.P-17 pursuant to which M.O.s 1 and 14 to 16 came to be recovered under Ex.P-18. He also witnessed the recovery of a TVS-Moped under Ex.P-19 and M.O.17 is the said motorcycle. P.W.20 brought the accused and the recovered incriminating objects to the police station. The arrested first accused (A-1) was sent for judicial remand and the case properties were sent to the court. At 3.00 p.m. on 31.3.03 P.W.20 arrested A-2 in the presence of P.W.15 and another and examined him. A-2 also gave a voluntary confession statement, the admissible portion of which is Ex.P-20, pursuant to which M.O.2 and M.O.18 came to be recovered under Ex.P-21 attested by the same witnesses. P.W.15 had given evidence on the above aspects. P.W.20 then came back to the police station with the arrested accused and the recovered objects and he sent A-2 for judicial remand and the case properties to the court. He gave a requisition to the court to subject the case properties for chemical examination. P.W.18 is the Magisterial clerk, who speaks about the receipt of the case properties along with Ex.P-24, requisition given by the investigating officer to subject the case properties for chemical examination. As an enclosure to court's letter, Ex.P-25, the case properties were sent to the laboratory. Exs.P-26 and P-27 are the chemical examiner's report and serologist's report.

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8. P.W.4 is the Assistant Professor of Forensic Medicine in the Coimbatore Government Medical College Hospital. On receipt of Ex.P-2, requisition to conduct post-mortem on the dead body, he commenced post-mortem at 12.15 p.m. On 12.3.03. During post-mortem he found various symptoms as noted by him under Ex.P-4, the post-mortem report. The symptoms noted are as hereunder :-

"The following ante mortem injuries are seen :-

1) Vertically oblique incised wound of 11 cms x 1.5 cms x subcutaneous deep involving upper two-third to middle two-third of front of left chest. The lower end of the wound is 10 cms away from the midline. The upper sharp end of the wound is 5 cms away from the left anterior axilla.

2) Vertically oblique stab injury of 3.5 cms x 1 cm x muscle deep seen over posterior aspect of upper part of right forearm 2 cms below the back of right elbow joint.

3) Oblique incised wound of 5 cms x 2 cms x muscle deep seen over middle of left scapular region. The upper sharp end is 13 cms from the left posterior axilla. The lower blunt end is 8 cms away from the midline.

4) Transversely oblique incised wound of 16 cms x 0.75-0.5 x subcutaneous deep involving 1 cm below injury No.3. The lower end is on the midline. The upper end is 8 cms away from the left posterior axilla.

5) Oblique stab injury of 5 cms x 1.5 cms x thoracic cavity deep seen over left back of middle chest. The lower margin 6 cms away from the midline and upper margin 4 cms below lower end of the injury No.4. On dissection the wound passes obliquely downwards through the 6th intercostal space and caused a stab of 3 cms x 1 cm for a depth of 4 cms in the posterior aspect of lower lobe of left lung. Total depth of the wound tract is 7 cms.

6) Oblique stab injury of 4 cms x 1 cm x thoracic cavity deep seen over the back of left lower chest. The upper end of the wound is 1.2 cms away from the midline. The lower end of the wound is 12 cms below the lower end of the wound No.5. On dissection the wound passes downwards obliquely and caused a stab of 1.5 cms x 1 cm for a depth of 1.5 cms in the posterior aspect of middle part of the spleen. Total depth of the wound tract is 6 cms.

7) Oblique stab wound of 12 cms x 3 cms x muscle deep seen over the right lower gluteal region. The lower sharp end is 19 cms below right anterior iliac spine. The upper blunt end is 13 cms away from the mid part of sacral region.

Other Findings :-

- Pleural and peritoneal cavities empty.
- Lungs cut section pale.
- Heart : Right side chambers contains clotted

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blood, Left side chambers empth - Coronaries patent.
- Hyoid Bone intact.
- Stomach contains 50 ml of mucosal fluid. No specific smell. Mucosa pale.
- Small intestine contains 20 ml of bile stained fluid. No specific smell. Mucosa pale.
- Liver, spleen, kidneys and brain cut section pale.
- Urinary bladder empty.
Viscera preserved for chemical analysis.
Sample of blood preserved."

Ex.P-3 is the viscera report, which shows neither alcohol nor poison was detected in the viscera. Ex.P-5 is his final opinion, which shows that death is due to external injury Nos. 5 and 6 and its complication. According to him, a weapon like M.O.1 could have caused those injuries and injuries 5 and 6 with their corresponding internal injuries would cause death or sufficient to cause death in the ordinary course of events.

9. P.W.17, the police constable attached to the investigating police station would state that he carried the requisition given by the Deputy Superintendent of Police (P.W.20) to the hospital for conducting post-mortem on the dead-body. After post-mortem he removed M.O.19 from the dead body and handed over the same to the investigating officer along with his special report, Ex.P-23. P.W.16 is the police constable in the investigating police station, who received the death intimation, Ex.P-22 from the police outpost in the Government Medical College Hospital, Coimbatore. P.W.14, examined to prove that he sold the knife to A-1, turned hostile. P.W.2 is the elder brother of the deceased. Apart from giving details about the property dispute between the two groups, as far as the occurrence proper is concerned, he would state that on the night of 10.3.03, after dinner, he went to sleep and at about 1.00 a.m. in the following morning he heard dogs barking and shouts from his brother's house that somebody is attempting on the life. According to him, his brother's house is fifteen feet north of his house. On hearing the noise, he along with his wife, P.W.s 3, 9 and others ran towards his younger brother's house where they saw both the accused standing in the house of his younger brother. A-1 was armed with a knife while A-2 was armed with a stick. On reaching there, he found P.W.1 having an injury on her right side axilla and a stab injury on the left side chest of his brother, since deceased. He pleaded with the accused not to stab any further. A-1, thereafter, criminally intimidated the witnesses that if they dare near him, he would not spare them. At that time, A-2 by turning his younger brother on his face, held him tightly to the ground by using the stick he had in his hand and A-1, with the knife in his hand, stabbed on his brother's left back side shoulder; hip and buttocks. Then the accused made good their escape. M.O.1 is the weapon in the hands of A-1 and M.O.2 is the stick in the hands of A-2. At 3.00 a.m. in the morning, by making use of a telephone in a nearby house, he informed P.W.11. During the occurrence time electric lights were burning in the house of the deceased and in that light he saw the crime. P.W.11 brought a car in which he along with P.W.9 and others took P.W.1 and Murugan,

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since deceased to the Government Hospital, Andhiyur. They reached the hospital at 6.00 a.m. from where they went to the Government Hospital, Erode. P.W.1 was admitted as an in-patient in the hospital and Murugan, since deceased, was transferred to the Government Hospital, Coimbatore and he accompanied Murugan to Coimbatore. At 2.00 p.m. on that day in the hospital at Coimbatore, Murugan died. P.W.2 was examined by the Deputy Superintendent of Police on that evening. He was also examined during inquest. Then two days later he identified A-2 in the test identification parade. P.W.3 is another eye witness to the crime. He also gave details of the pending land dispute between the parties. According to him, he went to his bed in his house at 9.00 p.m. on 10.30.03. His evidence as to what happened after he woke up suddenly at 1.00 a.m. after hearing the dogs barking is on the same lines as spoken to by P.W.2.

10. P.W.20 gave a requisition to the competent court on 7.4.03 to conduct test identification parade to identify A-2. On 19.5.03 test identification parade was conducted. P.W.5 is the District Munsif-cum-Judicial Magistrate, Perundurai. Pursuant to the order of the Chief Judicial Magistrate, Erode, he passed a consequential order on 19.5.03 to conduct test identification parade in the Central Prison at Coimbatore. At 4.15 p.m. on 19.5.03 he reached the Central Prison at Coimbatore and made all the preliminary enquiries. Then after observing all the legal formalities, he conducted the test identification parade. During test identification parade, P.W.1 identified A-2 correctly twice. P.W.2 identified A-2 correctly on all the three occasions. Rathinal, wife of P.W.2 could not identify A-2 even once. P.W.9 identified A-2 correctly on all the three occasions. P.W.3 identified A-2 correctly on all the three occasions. However, P.W.3's brother, Samiappan, could not identify A-2 even once. Kuppusami, another witness (not examined in court) could not identify A-2 correctly even once. Ex.P-6 is his proceedings relating to the conduct of the test identification parade.

11. P.W.7 is the Radiologist in the Government Hospital, Erode, whose evidence show that P.W.1 suffered a grievous injury. M.O.6 is the X-ray and Ex.P-9 is his certificate. P.W.9 is the nephew of the deceased. He would also state that when he was fast asleep in his house on the night of 10.3.03, he heard dogs barking in the early hours of the following morning and on waking up he also heard the distress call from a distance. This made him to run along with P.W.2 and others to his uncle's house, namely the house of the deceased. P.W.3 and others also came. The electric lamp was burning and at that time they saw P.W.1 having an injury on her right axilla and his junior paternal uncle, Murugan, since deceased, having bleeding injuries on his left side chest. A-1 and A-2 were there. A-2 was armed with a stick, while A-1 was armed with a suri kathi. All the witnesses pleaded with A-1 not to stab for which A-1 criminally intimidated them stating that if they dare to near them they would also be stabbed. After that, A-2 turned Murugan, since deceased, face down on the ground and then held him tightly, which enabled A-1 to stab on Murugan's hip, buttocks and back repeatedly. Then they made good their escape with the weapons of offence. M.O.s 1 and 2 are the respective weapons in the hands

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of A-1 and A-2. P.W.2 informed P.W.11 over telephone and, accordingly, P.W.11 came to the crime scene at 5.00 a.m. in a car in which both the injured were taken to the hospital as referred to earlier. He returned to his house from Government Hospital, Erode. P.W.10 is a neutral person. He knows the accused as well as the deceased. When he was grazing his cattle, at about 4.00 p.m. on 10.3.03, he noticed P.W.1 and her husband, since deceased, working in their garden-land. He also saw, at that time, A-1 and A-2 coming there and demanded P.W.1 and her husband to withdraw the case given by them against A-1's father and brother and if they did not do so, then something different would happen. P.W.10 then attended to his work. P.W.11 is a resident of Meenavapuram at Andhiyur. At 3.00 a.m. on 11.3.03, when he was in his house, P.W.2 passed on the information over telephone that his younger brother and P.W.1 have been stabbed and that he must come immediately with a car. Even at that time he was informed that it is A-1 and A-2, who had stabbed P.W.1 and her husband and by taking a car from Andhiyur he reached the house of P.W.1. Then he transported P.W.1 and her husband in the company of P.W.s 2 and 9 to the Government Hospital, Andhiyur, which they reached at 6.00 a.m. From there the injured were transported to the Government Hospital, Erode. When he reached the crime scene, he found Murugan having stab injuries on his chest and back, while P.W.1 was having a stab injury on her right hand axilla. After reaching the Government Hospital, Andhiyur, he returned home and he did not go to the Government Hospital, Erode. After completing the investigation, P.W.20 filed the final report in court against the accused as referred to earlier.

12. When the accused were questioned under Section 313 Cr.P.C. on the basis of the incriminating materials made available against each one of them, they denied each and every circumstance as false and contrary to facts. A-1 had filed a written statement contending in substance as hereunder :-

> "The deceased filed a civil suit claiming right over a cart-track at the instance of P.W.s 3 and 10 and that suit was dismissed; Mathammal, sister of Murugan was having an affair with one Veeran and, therefore, there was quarrel between the deceased and Veeran; in Murugan's house there are no electric lights; my father and brother are in remand on a false complaint given by the prosecution party leaving me alone in my family as a free citizen; hoping that if I am also sent to jail, the family of the deceased and P.W.3's brother would have a right of way over the cart-track and hoping that the accused would sell their lands also to them, a case has been foisted upon me on the advise of P.W.11; I was taken from my house at 5.00 p.m. On 16.3.03 and I was tortured; my elder brother Rangasamy sent telegrams on 19.3.03 and 20.3.03 and only after that my arrest is shown and I was sent for judicial remand; I have not given any confession statement nor had I produced any document; I am enclosing the two telegrams referred to above.

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> The first telegram is dated 19.3.03 and addressed to the Superintendent of Police, Erode District sent under the name of Rangasamy. The telegram reads -- "My brother Dhanapal (A-1 is called as Balu @ Dhanapal) was illegally custody of Andhiyur Police Station for two days". The other telegram is dated 20.3.03 and it is addressed to the District Collector, Erode, shown to have been sent by one Rangasamy. It reads as hereunder -- "My brother Dhanapal was arrested and kept in illegal custody at Andhiyur Police Station for the past three days. Pray intervention."

A-2 had denied the entire occurrence in toto and would add that the case has been foisted upon him.

13. Mr. V.K.Muthusamy, learned senior counsel appearing for the appellants would contend that A-2's involvement in the case is highly doubtful. A-2's name is not mentioned in the complaint, Ex.P-1, though the name of A-1 is mentioned. In Ex.P-1, the 2nd assailant is described as a person whose name is not known, but who could be identified on being seen. Though P.W.s 2, 3 and 9 would state that they know A-2 long before, yet that cannot be true because if really they knew, then atleast P.W.2, whose younger brother is the deceased, would not have failed to disclose the name of A-2 to P.W.1. Ex.P-1 had come to be recorded only at 10.00 a.m. on 11.3.03 almost nine hours after the incident and since in Ex.P-1 the name of A-2 is not mentioned, the evidence of P.W.s 2, 3 and 9 that they knew A-2 long before has to be necessarily doubted. P.W.20 admitted in his evidence in cross that his examination of the witnesses did not disclose that any of them are acquainted with A-2. Even in the requisition dated 8.5.03 (not marked, but available in the case records) given by P.W.20 to conduct test identification parade, he had stated as hereunder :-

> "As such although the murder was witnessed by a number of witnesses, they could not recognise the accused A-2, Felix. Therefore test identification parade has to be conducted of the said accused Felix by summoning the following eye witnesses."

Though P.W.s 1, 2, 3 and 9 have identified A-2 in the test identification parade, yet the other eye witnesses, who also participated in the test identification parade, could not identify A-2 at all. Therefore, there is an equal possibility of P.W.s 1, 2, 3 and 9 also not noticing the distinguishing features of A-2, which alone would have enabled each one of them to identify A-2 in the test identification parade. It has not come on record that P.W.s 1, 2, 3 and 9 had given any distinguishing and identifiable features of A-2 at any point of time. Therefore, in the absence of such particulars available on record earlier to the conduct of the test identification parade, it would not be safe to act upon the evidence of the witnesses that they identified A-2 in the test identification parade. For this purpose, learned senior counsel relied upon the following judgments :-

> "i) AIR 1981 SC 1392 ;
> ii) AIR 1987 SC (Short Notes) 61 :: 1987 LW (Crl.) SC (Summary of Cases) 61; and
> iii) 1973 LW (Crl.) 140."

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By relying upon the judgment of the Supreme Court reported in 2002 (7) SCC 295 at page 315, learned senior counsel would contend that when the witnesses claim that they already know A-2, then there was no necessity at all to conduct test identification parade as it is meaningless. It is then submitted by the learned senior counsel that going by the evidence of P.W.s 1, 2, 3 and 9 as to how A-1 completed the remaining acts of crime on Murugan after these witnesses arrived, it would be impossible for A-2 to escape without getting any injury on his person considering the position in which he was stated to be vis-a-vis Murugan, since deceased. On this point, learned senior counsel would contend that A-2 is not shown to have suffered any injury at all on any part of his body which is clear from the evidence of P.W.s 1, 2, 3 and 9 and, therefore, the involvement of A-2 should be disbelieved. It is further contended by the learned senior counsel that though bloodstains of human blood of Group "B" is shown to be found in the shirt recovered at the instance of A-2 and the same blood group is found in the personal wearing apparel of P.W.1, the deceased and the materials recovered from the crime scene, yet, in the absence of any evidence to show that A-2's blood do not belong to the same group, such material cannot be made use of. For this purpose, learned senior counsel relied upon the following judgments :-

"i) 2003 (6) Supreme 11;
ii) 2002 LW (Crl.) 485; and
iii) 2002 (1) SCC 702."

Coming to the involvement of A-1 in the crime, learned senior counsel contended that there is deep-seated enmity between the two groups and, therefore, there is every possibility of false implication of A-1 in this case. By taking us through Ex.P-30, the rough sketch and the evidence available on record, learned senior counsel would contend that P.W.2's house is at a distance of 500 feet from the crime scene and, therefore, almost in the dead of the night it would be impossible for P.W.2 to reach the crime scene in such a quick time to witness the remaining portion of the crime perpetrated by A-1 and A-2 on Murugan. Likewise, by taking us through the evidence of P.W.2, learned senior counsel wound contend that P.W.3's house is at a distance of two furlongs from his house and, therefore, it would not be possible for P.W.3 also to reach the crime scene and witness the occurrence as projected by him. P.W.3 had also admitted, according to the learned senior counsel, that his house is at a distance of 100 feet from the house of P.W.1. Therefore, the argument is P.W.s 2 and 3 could not have seen the occurrence at all. Learned senior counsel then contended that the arrest of A-1; his examination and the consequent recovery as spoken to by P.W.15, the Village Administrative Officer, coupled with the oral evidence of P.W.20 would clearly show that A-1 could not have given a statement voluntarily. If that is so, the entire recovery must be disbelieved. The possibility of electric lights burning in the house when the crime was committed is also highly doubtful and, therefore, in darkness none of the witness could have seen any of the assailants committing the crime.

14. In meeting these points, learned Addl. Public Prosecutor would contend that there is no legal requirement to conduct the test identification parade in each and every case. Conducting test identification parade is left to the discretion of the police

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officer to ensure that the investigation is proceeding in the right direction. Even without conducting test identification parade if the witnesses identify the assailants in court for the first time and if their evidence is found to be trustworthy, the court could always act upon such evidence. As far as not giving the distinguishable/identifying features of A-2 either in Ex.P-1 or during investigation by P.W.s 1, 2, 3 and 9, the same cannot lead this Court to conclude that the entire prosecution case must fail. Inasmuch as in the test identification parade P.W.s 1, 2, 3 and 9 have identified A-2 correctly, simply because the other eye witnesses, who also participated in the test identification parade, could not identify A-2 in that parade, this Court cannot ignore the evidence of the eye witnesses, who identified A-2. By taking us through the evidence of P.W.s 2, 3 and 9, learned Addl. Public Prosecutor would contend that even assuming that the police officer committed irregularities in requesting for test identification parade to be conducted, yet this Court could ignore it in view of the overwhelming evidence of P.W.s 1, 2, 3 and 9 in court identifying A-2. As far as the distance factor which would have prevented P.W.s 2 and 3 from reaching the crime scene, as contended by the learned counsel for the appellants, learned Addl. Public Prosecutor would argue that P.W.9 is living just next to the house of P.W.1; P.W.2's house is also in close vicinity to the crime scene and though P.W.3's house is not shown in the sketch, Ex.P-30, it is not possible to accept the submission made by the learned senior counsel. From the topography of the area, the chance of the above referred to witnesses reaching the crime scene and actually seeing the act of A-1 in completing the remaining assault on Murugan, since deceased, stands more probable. Though the investigating officer is shown to have admitted that his investigation did not reveal that any of the witnesses had acquaintance with A-2 prior to the crime, that by itself would not belittle the evidence of P.W.s 1, 2, 3 and 9 identifying A-2 in the test identification parade. Learned Addl. Public Prosecutor, on the scope of the test identification parade, cited the judgments reported in AIR 2003 SCC (Crl.) 1247 and AIR 2005 SCC (Crl.) 1269. As far as the omission to mention the name of A-2 in Ex.P-1, it is submitted by the learned Addl. Public Prosecutor that P.W.1 is shown to have suffered a very grievous injury; there was none by her side in the Government Hospital, Erode when the complaint had come to be recorded and, therefore, the omission to mention A-2's name, especially when P.W.1 in her evidence in cross has stated that she knows the place to which A-2 belongs, could be construed only as an inadvertent error having no impact at all in the prosecution case. Witnesses not giving any identifying features of A-2 either during investigation or when they were examined in court will not have any serious impact in this case, since their evidence before court on the involvement of A-2 is natural, convincing and, therefore, there would not be any difficulty at all for this court to accept their evidence. As far as the submission made by the learned senior counsel for the appellants that in the absence of any evidence regarding the blood group of A-2, in the context of the recovery of M.O.13 from him containing the same blood group as that of the deceased, it is argued by the learned Addl. Public Prosecutor that it is not required to be proved in each and every case. The case law cited by the learned senior counsel for the

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appellants in this regard, learned Addl. Public Prosecutor would contend that, those are all cases where the court was called upon to decide the prosecution case only on circumstantial evidence. If the argument of the learned senior counsel, that the blood group of the accused has to be proved in every case, is to be accepted, then it would lead to disastrous results. In this case, there is direct evidence regarding the crime and that evidence establish the involvement of A-2 also. Therefore, according to the learned Addl. Public Prosecutor, there is no compelling need for the investigating officer to take blood samples of A-2 and show that his blood group is different than the blood group found on the incriminating object recovered at his instance.

15. In the light of the arguments advanced by learned senior counsel for the appellants and learned Addl. Public Prosecutor for the State, we went through the entire materials with utmost care and caution. P.W.s 1, 2, 3 and 9 are examined as eye witnesses to the crime. P.W.1 is the wife of the deceased, while P.W.2 is the elder brother of the deceased. P.W.3 knows the accused as well as the deceased. P.W.9 is a nephew of the deceased. P.W.s 1, 2, 3 and 9 uniformly speak about the dispute over a cart-track between the prosecution party and the accused and though some cross-examination had been done of these witnesses, yet, in going through the evidence of these witnesses, we find that they have disclosed overwhelming materials to show the existence of the dispute between the parties. Ofcourse, neither the pleadings in the civil case and the judgment therein nor the complaint given to the police followed by the final report filed on that complaint are before court. But, nonetheless, as already stated, by going through the evidence of P.W.s 1, 2, 3 and 9 we are fully convinced that there exists a serious dispute between the two groups. The prosecution case is that only in the context of that rivalry over the dispute regarding the cart-track, the occurrence had taken place. There is a person called Idea Kumarasamy. He is the head of the family, consisting of, among others, Rengasamy (not an accused) and A-1. Rengasamy and A-1 are brothers and incidentally the sons of Idea Kumarasamy. The prosecution had not shown any material adverse against A-2, namely, that he has an affinity towards the family of Idea Kumarasamy nor has any adverse interest against the prosecution party. The prosecution also did not show that A-2 has been exercising any right over the disputed cart-track or he would stand to gain in that regard by eliminating the deceased or even assaulting P.W.1. As noted earlier, the rivalry is between the deceased on the one hand and the family of Idea Kumarasamy on the other.

16. The occurrence is shown to have taken place on the intervening night of 10.03.03/11.03.03 (i.e.) at 01.00 hours. Ex.P-1 is the complaint given by P.W.1. It is shown to have been recorded by P.W.19 at 10.00 a.m. on 11.3.03 and, thereafter, it was registered in the investigating police station at 12.00 noon on the same day. Since an argument has been advanced by the learned senior counsel for the appellants that there is inordinate delay of nearly nine hours in giving the complaint to the police and, therefore, it vitiates the entire prosecution case, we are initially addressing ourselves to that question. It is not as

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though the occurrence had taken place in the heart of the town. From the printed first information report, Ex.P-29, we see that the police station is at a distance of 10 Kms., from the crime scene. The occurrence had taken place at the dead of the night. The injured and the deceased are downtrodden people. That is why the charge includes an offence under the provisions of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. P.W.1 had received a grievous injury. Ofcourse, her evidence shows that after the assault on her; after the initial assault on her husband, when she cried for help, P.W.s 2, 3 and 9 came running to the crime scene and they watched the remaining assault perpetrated by A-1 on her husband. Therefore, it is clear, as rightly contended by the learned senior counsel that atleast three witnesses have come to the scene and all of them appear to be males. Therefore, the question that follows is as to why either P.W.1 or any of the other witnesses, namely, P.W.s 2, 3 and 9 have not chosen to take steps immediately in lodging a complaint. As we have already noted, P.W.s 2 and 9 are closely related to P.W.1 and the deceased. It was almost dead of the night. There is no evidence to show that there was any public transport facility to reach the police station immediately after the occurrence. Ofcourse, availability of telephone in some of the nearby houses are established. But we must remember that how fast a person would react or respond in seeing a ghastly crime, especially when the victims are thick relatives to such witnesses, would vary from person to person. But, in this case, it is not as though there was a complete lull from 1.00 a.m. till 10.00 a.m. on the same day at which point the complaint had come to be given. P.W.2's evidence is that he made use of a phone in the nearby house and called P.W.11, who appears to be a prominent man in the local communist group to come and render help. P.W.2 had made a request to P.W.11, by informing the incident, to bring a car for transporting the injured to the hospital. It must also be noticed that Murugan did not die at the spot. Therefore, the witnesses would be eager to save their lives. P.W.11 in his evidence would state that he received information about 3.00 a.m. (i.e.) within two hours after the crime and he lives at a distance of 7 Kms. or so from the crime scene. Therefore, it is clear that within two hours from the time at which the crime was committed, P.W.11 was informed over phone. P.W.9 would state that P.W.11 reached the crime scene at 5.00 a.m. in a car. P.W.11's evidence is that he arranged for a car at Andhiyur and then reached the crime scene. P.W.6 is the duty doctor in the Government Hospital at Andhiyur. His evidence shows that at 6.15 a.m. on 11.3.03 he examined Murugan, since deceased and immediately,thereafter, P.W.1. Therefore, it is clear that the prosecution party was not keeping idle all the time till the police reached the hospital at Erode and recorded the statement of P.W.1. P.W.6's evidence is that he advised the patients to be taken to the Government Hospital at Erode. Ex.P-28 is the intimation sent by the doctor at Andhiyur hospital to the investigating police station informing them about the medio-legal case. P.W.19 would state in his evidence that on receipt of information about P.W.1 and Murugan examined by the doctor at the Government Hospital at Andhiyur, he reached the Government Hospital, Andhiyur where he was informed that both the injured have been transferred to the Government Hospital at Erode for better treatment. Accordingly, P.W.19

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reached the Government Hospital at Erode at 9.30 a.m. and then finding P.W.1 alone there, by examining her, he recorded her statement. Thus the complaint, namely, Ex.P-1 was registered in his police station at 12.00 noon. Mr.V.K.Muthusamy, learned senior counsel fairly states (he is hailing from Periyar District) that Erode is at a distance of roughly 25 miles from Andhiyur where the hospital and the investigating police station are situated. Learned Addl. Public Prosecutor states that the distance between Erode and Andhiyur is around 36 Kms. Whatever it is, from the sequence of events as referred to above, namely, at 3.00 a.m. P.W.11 receiving the information about the crime; P.W.11 reaching the crime scene at 5.00 a.m.; P.W.1 and Murugan being examined by the doctor at Andhiyur Government Hospital at 6.15 a.m.; P.W.19 reaching Andhiyur Government Hospital on receipt of intimation about the crime; then reaching the Government Hospital at Erode at 9.30 a.m. and by examining P.W.1 at 10.00 a.m. recording her complaint, definitely shows that the prosecution was moving from one stage to another stage in all promptness and there is no deliberate waste of time. In these circumstances, we are inclined to reject the submission made by the learned senior counsel that on account of the delay in giving the complaint, the entire prosecution case must be doubted.

17. As far as the occurrence proper is concerned, as we have already noted, the entire prosecution case rests upon the oral evidence of P.W.s 1 to 3 and 9 alone, of whom P.W.1 is an injured eye witness. It has come out on evidence and as could be seen from the rough sketch, Ex.P-30, P.W.9 is residing almost next to the house of P.W.1. Karuppan is P.W.9's father. The house on the north of P.W.1's house separated by a care-track is the house of Karuppan (see Ex.P-30). Therefore, there cannot be any doubt that P.W.9 lives almost at a hand shaking distance from the crime scene. The sketch also shows that P.W.2 lives somewhere on the north-east from the crime scene and the witness admitted that it is at a distance of 500 feet. The distance of 500 feet is not too long to be covered by any person in a quick time. P.W.2 is shown to be a male aged about 27 years. Therefore, the possibility of P.W.2 also reaching the crime scene on hearing the alarming call of P.W.1 cannot be totally said to be impossible. As far as the house of P.W.3 is concerned, though P.W.2 would state that he lives two furlongs away, P.W.3 himself stated that his house is at a distance of 100 feet from the crime scene. He is also a male shown to be aged 44 years. Ofcourse, the house of P.W.3 is not shown in the plan. But, however, we are inclined to accept his evidence that he lives in close proximity to the house of P.W.1 where the crime was committed. Therefore, without any hesitation, we conclude that there is every possibility of P.W.s 2, 3 and 9 reaching the crime scene in time after hearing the alarming call of P.W.1. Once we find that the presence of P.W.s 2, 3 and 9 in the occurrence place is prima facie established, then the question is can their evidence along with the evidence of P.W.1 could be accepted as reliable evidence.

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18. P.W.1 is an injured eye witness. Normally, as rightly contended by the learned senior counsel for the appellants, the evidence of an injured eye witness must be kept in a high pedestal

than the evidence of the other eye witnesses. Having regard to the enmity between the two families shown to be in existence, we proceed to examine the oral evidence of P.W.s 1, 2, 3 and 9 with great care and caution. Enmity is always said to be a double edged weapon so that it can cut either way. Enmity may be used as a ground to foist cases. Enmity can be used to wreck vengeance. The prosecution case is that only in order to wreck vengeance on them, the occurrence had taken place and that too in the context of the dispute over the cart-track. We have already concluded that the evidence of the witnesses show that there exists a dispute between the two groups regarding the cart-track. P.W.1's evidence is that even at 4.00 p.m. on the occurrence day evening, when she and her husband were working in the garden-land, A-1 came there with another person and intimidated them that unless they withdraw the case already given by them against Idea Kumarasamy and Rengasamy, things would take a different shape. This evidence of P.W.1 about the incident at 4.00 p.m. in the garden-land is spoken to by P.W.10. He appears to be an independent person. Nothing is available on record to even infer that he may lean on the prosecution side. His evidence shows that when he was grazing cattle in his garden-land, he noticed P.W.1 and her husband doing some work in their garden-land and at that time the accused came there and insisted that P.W.1 and her husband should withdraw the case filed against A-1's father and A-1's elder brother and left the place threatening the scenario would completely change if they do not do so. Ofcourse, while he was cross-examined, he admitted that there are litigations between his family and the family of Idea Kumarasamy and that there is a pending civil dispute also. But, however, he firmly stated in his evidence in cross that neither he is leaning towards P.W.1 and her family nor towards the family of the accused. He was fair enough in saying that he did not see the occurrence proper in this case. Therefore, going by his entire evidence, we find that he appears to be a reliable witness and his evidence definitely impresses us. In these circumstances, we hold that the evidence of P.W.1 that there was an incident at 4.00 p.m. in which A-1 and another person participated as referred to earlier stands fully corroborated by the oral evidence of P.W.10.

19. Let us now find out the materials regarding the occurrence proper itself. The primary witness is P.W.1. She is injured and her evidence is that on reaching home from the agricultural land, she and her husband informed P.W.s 2, 9 and others about the incident at 4.00 p.m. on that day and they asked them to lie low for the night and on the next day the whole thing could be sorted out. P.W.2 had given evidence in total corroboration to the oral evidence of P.W.1 on the above aspect. According to P.W.1, after dinner when she and her husband went to bed, around midnight she heard dogs barking, which made her to wake up. When she woke up, she noticed A-1 and another person (we are carefully mentioning at this stage the 2nd assailant as another person since an argument has been advanced that the identity of the 2nd assailant had not been established at all) standing by the cot where her husband was sleeping. Her evidence is that at that time A-1 addressing her by her caste name, recalling the incident that took place at 4.00 p.m. in the evening and finding fault with her for not complying with

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the request, stabbed her on her right axilla. Her evidence also shows that A-2 attempted to beat her with a stick, but, however, by that time she had already fallen down after receiving the injury at the hands of A-1. A-2's attempt did not result in any injury on her. She would then state that on her raising her voice in pain, her husband woke up and A-1 describing him also by his caste, stating the same reasons as referred to earlier, stabbed him on his right side chest. This made P.W.1, she states, more vociferous and she shouted and this shouting alone attracted the attention of P.W.s 2, 3 and 9. P.W.s 2, 3 and 9 uniformly say that they also heard the loud call of P.W.1 that her husband is being attacked and, therefore, they ran towards the scene. From this stage we consider the evidence of P.W.s 1, 2, 3 and 9, who uniformly speak that on P.W.s 2, 3 and 9 arriving at the crime scene and pleading with folded hands to the accused not to cause hurt any more; the 2nd person over turned injured Murugan to the ground on his face; held him tightly and at that stage, A-1 repeatedly caused injuries by stabbing on the back of Murugan. Though these witnesses including P.W.1 have been cross-examined lengthily on the 2nd part of the prosecution case, especially with particular reference to the witnesses, namely, P.W.s 2, 3 and 9 could not have come to the crime scene at all, we find that all the witnesses have stood the ground and kept their evidence in chief regarding the occurrence proper intact. One of the arguments advanced by the learned senior counsel for the appellants is that when Murugan is forced to over turn on his face to the ground and the 2nd person was holding him in such a position, it would not have been possible for A-1 to cause so many injuries on the back of Murugan. In analysing the argument, we find that there is absolutely no evidence to show that from what position the 2nd person was holding Murugan, since deceased, to the ground. In fact, P.W.2 in his evidence had categorically stated that after over turning Murugan, since deceased, to the ground, the 2nd assailant held him tightly by pressing the stick, which he had with him. Therefore, it is possible that the 2nd person could not have been sitting on Murugan when he was lying down, which alone would have disabled, on all probability, from A-1 causing the remaining injuries on the back of Murugan. Therefore, going by the evidence of P.W.2, as referred to above, it is possible to conclude that the 2nd person would not have covered Murugan entirely by focussing his body on the other person's body. For the reasons stated above, we hold that it is not possible to doubt the prosecution case that A-1 could not have caused the remaining injuries on the person of Murugan as spoken to by the witnesses. In view of our discussion, we have no doubt at all to conclude that the evidence of P.W.1 establish beyond doubt that it is A-1, who caused the injury on her and the evidence of P.W.s 1, 2, 3 and 9 show that A-1 had attacked Murugan, since deceased. In other words, no other conclusion is possible from the evidence of these eye witnesses regarding the overt act attributed to A-1 vis-a-vis the deceased.

20. Let us now find out, on the arguments advanced by the learned senior counsel for the appellants and the learned Addl. Public Prosecutor whether this Court could safely hold that A-2 is the other person, who is involved in the crime. It must be noticed that the prosecution did not say that the 2nd person had

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caused any injury at all on Murugan, since deceased. Though he made an attempt to attack P.W.1 with a stick, yet it did not result in any injury on her. To decide the prosecution case that the 2nd person involved in the crime is A-2, we must go from the earliest material on record till the witnesses spoke in court. P.W.11 in his evidence would state that even at 3.00 a.m. when he received information, P.W.2 told him that A-1 by name Balu and the 2nd person by name Felix (A-2's name is Felix) had stabbed P.W.1 and Murugan. In his evidence in cross, he stated that the phone message was received by John, his neighbour and he alone passed on that information to him. John had not been examined in this case. P.W.2 nowhere states that he informed P.W.11 as to who the assailants are. What all he states is that at 3.00 a.m. he telephoned P.W.11 making use of the telephone of a neighbour available close to the crime scene, that P.W.1 and Murugan have been attacked. Therefore, when P.W.2 did not inform the names of the assailants to P.W.11; when P.W.11 admits that only John, a neighbour who received the telephonic message, passed on that to him, then from the evidence of P.W.11 that he was informed by P.W.2 even at 3.00 a.m. that the name of the 2nd assailant is Felix cannot be believed at all at its face value. From one other angle also we could test the prosecution case that the 2nd assailant is none else than Felix, who is arrayed as A-2 before the court. P.W.s 2, 3 and 9 have stated in their evidence that they knew A-2 earlier. We will discuss about it later on. Therefore if P.W.11 was informed that the 2nd assailant's name is Felix and if P.W.s 2, 3 and 9, who had seen A-2 in the crime scene and if really they knew him earlier, then we fail to understand as to how in Ex.P-1 the name of the 2nd assailant is not found mentioned. What is mentioned in Ex.P-1 is A-1 and a person, whose name not known but, however, who could be identified if seen, were the assailants. Therefore, at the risk of repetition we state that if really the name of the 2nd assailant was known to P.W.s 2, 3 and 9, then there would not have been any omission to mention the name of the 2nd assailant in Ex.P-1. It is not as though Ex.P-1 had come to be given in any confused state of mind. This complaint came to be registered at 10.00 a.m. in the hospital on the day of the occurrence. There is no medical evidence at all to show that P.W.1 would not have been in a position to talk. The argument advanced by the learned Addl. Public Prosecutor that having regard to the grievous injury shown to have been received by P.W.1, she would not have been in a position to regain her composure and disclose the entire details of the crime do not appeal to us at all for the reasons stated above, namely, there is no medical evidence to show that her condition was so bad that she could not have remembered all the details of the accused and disclosed it to P.W.19. On the other hand, we find, from a reading of Ex.P-1 that it is a neatly narrated complaint, which means that P.W.1 would have been clear in her mind and thoughts as to who the persons, who attacked not only her but also her husband.

21. In this context, our attention is drawn to the evidence of P.W.1, who in her cross-examination had answered to a question put by the defence that A-2 is a resident of Michaelpuram. There is no surprise at all in P.W.1 giving the place to which A-2 belongs because by that time she had come to court to give evidence, the

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prosecution had collected all the details. In addition to our discussion, we refer to the evidence of P.W.s 2, 3 and 9 as to what they have said regarding A-2. P.W.2, when he was cross-examined, had stated that he knows both the accused even prior to the crime. P.W.3 had stated when he was cross-examined that he knows A-2 very well. P.W.9 had also answered when he was cross-examined that he knows A-2 even before. In this context it is useful to refer to the evidence of P.W.20, who would state that when he examined the witnesses during investigation, it had not come to light that A-2 is already known to those witnesses. Therefore, this evidence of P.W.20, as referred to above, belies the evidence of P.W.s 1, 2, 3 and 9 that they would have known A-2 prior to the crime. We may also note that to conduct test identification parade, P.W.20 has given a requisition to the court. That requisition is dated 8.5.03. That requisition contains the following material :-

> "As such although the murder was witnessed by a number of witnesses, they could not recognise the accused A-2, Felix. Therefore test identification parade has to be conducted of the said accused Felix by summoning the following eye witnesses."

Therefore, even up to 8.5.03 P.W.20 was so sure that none of the witnesses could recognise the 2nd assailant, who participated in the crime as Felix. In these circumstances, without any hesitation we conclude that none of the witnesses, namely, P.W.s 1, 2, 3 and 9 would have known the 2nd assailant, who participated in the crime either prior to the crime or would have come to know him at the crime scene or even thereafter till the test identification parade was held. If really P.W.s 1 to 3 and 9 knew A-2 before hand, we are really surprised to find as to why a test identification parade was conducted for such witnesses, who knew A-2.

22. In Munshi Singh Gautam (Dead) & Ors. - Vs - State of M.P. (AIR 2005 SCC (Crl.) 1269), the Supreme Court held thus :-

> "The necessity for holding a test identification parade could arise only when the accused are not previously known to the witnesses."

In Dana Yadav @ Dahu & Ors. - Vs - State of Bihar (2002 (7) SCC 295), the Supreme Court once again held as hereunder :-

> "If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and they are waste of public time to hold the same."

In Jadunath Singh - Vs - State of U.P. (1970 (3) SCC 518), in para-15, the Supreme Court referred to an unreported judgment dated 15.1.1957 in C.A. No.92/56, wherein it was held thus :-

> "If the accused present is well known by sight, it would be waste of time to put him for identification."

Therefore, from the very fact that P.W.s 1, 2, 3 and 9 participated in the test identification parade in which only they have identified A-2 lead us to hold that they could not have known A-2 before hand. A-2 when he was questioned by P.W.5, the Judicial Magistrate at the end of the test identification proceedings as to whether he wants to say anything in regard thereto, A-2 stated as hereunder :-

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"By 13.3.03 or so, police caught me and kept me in the police lock up at Andhiyur police station; I was in police lock-up for two days at Vellithirupur police station; I was photographed and those photographs were shown to the witnesses for the purpose of identification."

Though we find that P.W.5 had complied with all the legal formalities in conducting the test identification parade and in parading a suspected assailant among similarly placed persons, the witnesses have identified the 2nd assailant as A-2, yet we are not inclined to accept that evidence of P.W.s 1 to 3 and 9 that it is only A-2 and A-2 alone, who participated in the crime for the reasons to be stated hereunder.

23. Since we have concluded that A-2 was not known to P.W.s 1 to 3 and 9 at all, then to give credibility to their evidence that they identified A-2 in the test identification parade, it is expected of each one of them to give, at various stages, namely, at the stage of giving the complaint and during investigation, to give any distinguishing identifiable features of the said suspect. If that is not given, then courts have held that no credibility at all could be attached to their evidence when they have identified the suspected accused in the test identification parade and it is only that suspected accused is arrayed before the court for trial. The earliest judgment of the Supreme Court on this aspect is the one reported in Wakil Singh & Others - Vs - State of Bihar (AIR 1981 SC 1382 :: 1981 CRL. L.J. 1014) wherein the Supreme Court held as hereunder :-

"In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded."

24. In Subash, Shiv Shankar - Vs - State of U.P. (1987 LW (Crl.) (Short Notes) 61), the Supreme Court once again held as hereunder :-

".... there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha I (F.I.R.) nor in their statements during investigation, the

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> eye witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had 'sallow' complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Exhibit Kha I or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu."

25. The Supreme Court in yet another earlier decision reported in Rameshwar Singh – Vs – State of Jammu & Kashmir (1973 LW (Crl.) 140) held as hereunder :-

> "The statements of the P.W.s AGS in the report made by him to the police does not contain any description of the alleged culprit. Had the witness known the culprit earlier, one would have reasonably expected him to so state in the report. If, however, without knowing him earlier, he had formed a distinct impression of the culprit's looks and bearing, so as to be able to identify him later, then also one would have expected this witness to give in the report the description of the culprit as seen by him, so as to provide the investigating authorities with something tangible as guideline to start with the investigation. His identification in court without any previous identification at a test parade and without any description in Ex.P-1 to corroborate it, is far too slender a piece of evidence to base the appellant's conviction thereon. So, his evidence is of no value in bringing home the offence to the appellant."

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26. Therefore, law is consistent on the above aspect, namely, when the assailant is not previously known to the witnesses, then the witnesses are expected to disclose some features of the assailant, which got impressed in their mind at the earliest point of time, namely, at the time of giving the complaint or atleast during investigation, which alone would enable the court to evaluate their evidence, which comes up before the court later on. In this case, admittedly, and we could say without any fear of contradiction that neither in Ex.P-1 nor during investigation nor during their evidence in court any identifying and distinguishable features of the 2nd person, who participated in the crime is reflected. One other aspect, which worries us is that the 2nd appellant was arrested on 31.3.03 and the test identification parade was held on 19.5.03. Though it is held after 45 days, yet the delay in conducting the test identification parade also raises

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a serious doubt in our mind, namely, whether the prosecution was deliberately gaining time to get some material to fix the identity of the 2nd assailant. For all the reasons stated above, we are of the considered opinion that it would be very unsafe to act upon the evidence of P.W.s 1, 2, 3 and 9, who claim to have identified the 2nd assailant as A-2 in the test identification parade and speak of his involvement in their evidence before court to convict A-2. In other words, their evidence appears to be very slender and weak.

27. In the light of the discussion made above, we have no hesitation at all to conclude that the prosecution had not established satisfactorily the involvement of A-2 as the perpetrator of the crime by sharing the common intention with A-1. Under these circumstances, we are not deciding the other question argued, namely, whether the prosecution is duty bound in every case to establish the blood group of the assailant; place it before court to warrant a conviction of the said person based on the recovery of incriminating objects containing a blood group, which is found to be similar to that of the deceased.

28. In the result, the appeal is allowed in part. The judgment under challenge, in S.C. No.142 of 2003, as far as A-1 is concerned, stands sustained and as far as A-2 is concerned the judgment under challenge is set aside and he is acquitted of all the charges framed against him. Fine amount, if any paid by A-2, is directed to be refunded to him. Bail bonds executed by A-2 shall stand terminated forthwith.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

GLN

To

1) The Principal Sessions Judge, Erode.
2) The Judicial Magistrate, Bhavani.
3) - Do- Thro' The Chief Judicial Magistrate, Erode.
4 The District Collector, Erode.
5 The Director General of Police, Chennai.
6 The Superintendent of Central Prison, Coimbatore.
7 The Public Prosecutor, High Court, Madras.
8) The Deputy Superintendent of Police, Bhavani.

1 cc to Mr.M.M. Sundaresh, Advocate, Sr. 37303

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